

NEIL ABERCROMBIE
GOVERNOR



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September 21, 2011

Mr. Robert Harris
Sierra Club, Hawai'i Chapter
P.O. Box 2577
Honolulu, Hawai'i 96803

Via Email and U.S. Mail

Re: Emergency Proclamations Concerning Unexploded Munitions and
Nene Geese

Dear Mr. Harris:

This letter is in response to your September 19, 2011 letter asking Governor Abercrombie to withdraw the emergency proclamations he issued to address the danger of unexploded munitions and the danger that nene geese pose to aircraft using the runway at Lihue. The Governor acted responsibly and appropriately to address threats to the health and safety of the people of Hawaii in issuing these emergency proclamations. For the reasons explained herein, I have advised the Governor not to withdraw these proclamations.

Background on Unexploded Munitions

Unexploded munitions on Hawaii's land pose a real threat, and swift action was and is needed to address it. A recent example of the effectiveness of the State's action occurred at Hapuna Beach State Recreation Area. On Sept. 6, 2011, the Army Corps of Engineers began a sweep at Hapuna Beach and found a hand grenade and high explosive mortar. On September 20, 2011, another hand grenade was found at Hapuna Beach. These munitions were safely destroyed in place. Without the emergency proclamation, those grenades might still be on the beach today.

The significant risk to public health, safety and welfare of leaving unexploded munitions on Hawaii's public lands made it imperative for the State to secure federal funding, through the U.S. Army Corps of Engineers (Army Corps), to remove these munitions. Failure to act quickly would have resulted in the loss of these federal funds.

There are an estimated 128,790 acres of land in the State of Hawaii that are eligible for remediation under the Defense Environmental Restoration Program (DERP). The State owns over 37,000 of those acres. Under DERP, the Army Corps is authorized to assess, investigate and remediate environmental conditions, especially unexploded munitions, on properties that were formerly used by the military services.

The State must provide the Army Corps with a right of entry for State lands to allow the Army Corps to conduct its investigation and remediation of unexploded munitions. Before that can happen, it is the view of the Department of the Attorney General that environmental laws, in particular chapter 343 of the Hawaii Revised Statutes, require the State to consider the cumulative impact of any munitions and its disposal on the environment.

During the assessment and investigation phases, the Army Corps may encounter unexploded munitions or other hazardous substances that require immediate removal or disposal because they pose a threat to human health and safety or to the environment. The exact nature and location of the unexploded munitions are not known until they are encountered. Because of the unpredictability regarding the nature and location of unexploded munitions, it is not possible to provide information regarding environmental impacts ahead of time. If the right of entry for the Army Corps was delayed or held up due to an environmental assessment requirement, this could jeopardize the ability of the Army Corps to discover and detonate dangerous munitions. This would quite literally put people's lives in danger.

Background on Nene Geese

With respect to the nene goose problem on Kauai, there is a clear threat to aviation safety that cannot reasonably be ignored. We know that bird strikes occur at Lihue airport, we know that when geese strike aircraft the damage is especially severe, and we know that the Federal Aviation Administration has recommended a zero tolerance policy for geese at airfields. We also know that the population of nene geese is located perilously close to a critical area for landing and departing aircraft, and we know that the population of nene geese located near the airport is increasing 20% per year.

The nene goose problem has not been getting smaller or remaining constant. As these birds are protected in such a way that they may multiply and increase in numbers, the problem on Kauai only gets worse as the geese have found a habitat that provides food, cover and everything necessary to survive. Given the fact that the geese have no reason to fear humans, the area being encroached upon by these birds continues to enlarge and the problem will continue to grow. Nene geese are large birds. If a strike were to hit an engine, it could be fatal to those on board the aircraft. Aircraft have gone down in other areas after hitting birds much smaller than a nene goose. Immediate action was and is necessary to address this hazard to aviation and the general public.

Legal Authority

Your letter mistakenly cites section 128-7, Hawaii Revised Statutes as the only authority for the Governor's emergency proclamations, and suggests that since Hawaii is not under military attack and the President has not declared a civil defense emergency period, this section cannot be used to keep the people of the State safe. This is simply wrong.

Section 127-10, Hawaii Revised Statutes, provides that when sections 127-1 to 127-9, Hawaii Revised Statutes are not in effect¹, the Governor may exercise any and all powers under chapter 128, Hawaii Revised Statutes, to provide other disaster relief, and that all provisions of the law provided in chapter 128, Hawaii Revised Statutes, during such period are made applicable to other disaster relief, including without limitation, provisions making or authorizing appropriations or expenditures.

Pursuant to section 127-10, Hawaii Revised Statutes, "other disaster relief" includes, but is not limited to:

the preparation for and the carrying out of all functions, other than functions for which military forces are primarily responsible, to minimize and repair injury and damage resulting from disasters caused by fire, flood, tidal wave, volcanic eruption, earthquake, or other natural causes and major disasters caused by acts of man, including massive oil spills, nuclear accidents, airplane crashes and civil disturbances.

Section 128-7 provides that if the Governor finds that an attack upon the State has occurred or that there is a danger or threat thereof, then a civil defense emergency period can be declared. This section also provides that "[t]he governor shall be the sole judge of the existence of the danger, threat, state of affairs, or circumstances."

Because section 127-10 operates in concert with section 128-7, a civil defense emergency period can be declared if the Governor finds that a disaster has occurred or that there is a danger or threat thereof. The law gives the Governor broad emergency powers, including taking all steps necessary and appropriate to protect the public. Here, the Governor has found that there is the danger of disasters occurring, related both to unexploded munitions and with respect to airplane crashes caused by bird strikes.

As it relates to unexploded munitions, the statute is clear that the Governor has the power to act to avert disasters caused by acts of man. The unexploded munitions on State lands are clearly there as the result of acts of man. While the State has been fortunate that people have not yet been injured by unexploded munitions, the likelihood that someone might be injured in the future continues to get larger as time moves on. The State's actions help to ensure that once unexploded munitions are discovered, they can be dealt with quickly and with minimal disruption to the public.

¹ Pursuant to Act 35, Regular Session Laws of Hawaii 1961, sections 127-1 to 127-9, Hawaii Revised Statutes, have been indefinitely suspended and are not in effect.

As it relates to nene geese, the statute is clear that the Governor has the power to act to avert disasters, including airplane crashes. The actions taken to relocate² the nene geese are specifically designed to prevent airplane crashes near Lihue Airport.

Your suggestion that the Governor has suspended "statutes that directly protect the public from harm" is not true. The Governor acted responsibly in exercising his powers to address the significant threat to health and safety posed by unexploded munitions and the presence of nene geese near the airport. Such threats constituted an emergency which required a response. Given the circumstances and conditions, it was the best, most prudent option at the time. Contrary to your letter, the suspensions involved are strictly limited to the purposes of the proclamations and do not undermine the public goals of transparency, accountability, and community involvement. The Governor has a long track record of protecting the environment, and he certainly respects the environmental laws of the state. However, above all other priorities are his legal and moral obligations to protect the health and safety of people. In this case, the issuance of these proclamations was made after extensive consultation with the Department of the Attorney General.

The Governor has an affirmative duty to protect the public. He took the appropriate legal steps to protect the public from the danger posed by unexploded munitions and the threat of airplane crashes caused by bird strikes. For all of the foregoing reasons, I have advised the Governor not to withdraw his proclamations.

Very truly yours,



David M. Louie
Attorney General

cc: Senate President Shan Tsutsui
Speaker of the House Calvin Say
Senator Michael Gabbard
Representative Denny Coffman

² I note that you misquoted the recent Civil Beat article that covered the topic of relocation of the nene geese on Kauai. Your letter said that, according to the article, "over \$7.2 million was spent on this effort without a report of a single nene goose strike." The article actually said that 10 birds have been transferred to Maui so far, with 400 more on the way as part of a five-year, \$7.2 million plan.